U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date: April 27, 1999

Case No.: 1996-INA-0389

In the Matter of:

ERLINDO V. EVARISTO, M.D.,
Employer

On Behalf Of:

LORNA SANTOS,
Alien

Certifying Officer: Paul R. Nelson, Region IX

Appearance: Sanford B. Reback, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 16, 1994, Erlindo V. Evaristo, M.D. ("Employer") filed an application for labor certification to enable Lorna Santos ("Alien") to fill the position of Cook, Domestic Service (AF 21). The job duties for the position are:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken rice dishes including soups and salads according to my instructions or drawing on occupants own recipes. Will also be required to plan menus and order foodstuffs. The occupant of this position will be required to serve meals and then after the meals are over, will cleanup the kitchen and cooking utensils. Will serve and cook meals for two adults and various guests. In this respect, the occupant will be required to determine how many will be at each meal each day in order to properly plan the menu. Occupant will do the shopping by bus, the cost of which will be pad [sic] for my [sic] this employer. Occupant will not be required to use own transportation of do any driving. Will also not be responsible for any housekeeping duties since these duties will be performed by persons from a housekeeping agency.

The requirements for the position are two years of experience in the job offered, or two years of experience in the related occupation of Restaurant Cook. Other Special Requirements are "Personal References required."

The CO issued a Notice of Findings on November 20, 1995 (AF 14-20), proposing to deny certification on the grounds that no *bona fide* full-time job offer exists in violation of § 656.3. The CO notified Employer that it must submit documentation to establish that the job offer meets the definition of "employment" under § 656.3. The CO also found that Employer's requirement of cooking Philippine-style food was unduly restrictive and informed the Employer that it must delete the requirement or document the business necessity of the requirement.

In its rebuttal, dated December 22, 1995 (AF 6-13), the Employer contended that the Employer will entertain occasionally, that no duties other than cooking will be required of the position, that there are no children in the household, that the Employer is only interested in

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

eating Philippine food, and there is no entertainment schedule. Employer's Counsel also argues that the CO's inquiry into whether the position is full-time is not a proper inquiry.

The CO issued the Final Determination on January 31, 1996 (AF 3-5), denying certification because the Employer has failed to document that the employment of the Alien will result in a full-time, permanent, 40-hours per week job.

On February 14, 1996, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

This matter falls squarely within our holding in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Carlos Uy at 16.

ORDER

The Certifying Officer's denial of labor certification is **VACATED**, and this matter is **REMANDED** for consideration in light of our decision in *Carlos Uy*.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.